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No. 84-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, *et al.*,
Petitioners,

v.

JEFF D., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

May a court, consistent with the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, and the federal Constitution, enforce a complete waiver of plaintiffs' right to costs and attorney's fees under § 1988, where the waiver is exacted by state defendants on the eve of trial as a condition to a settlement providing substantial injunctive relief on the merits.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents, a class of over 2,000 indigent children from the State of Idaho, suffer from emotional and mental handicaps and are institutionalized or otherwise placed in petitioners' custody.[1] Due to petitioners' failure to provide appropriate mental health services, many of these children were confined in adult psychiatric wards of state hospitals, including the facilities at State Hospital South ("SHS"), or in out-of-state treatment institutions located thousands of miles from their homes and families. Joint Appendix ("J.A.") 5, 6. Most of the children suffer from conditions that could be successfully treated by appropriate mental health care in the

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[1] Petitioners are the Governor of the State of Idaho, the Director of the Idaho Department of Health and Welfare, and two officials of the Adult State Mental Hospital, State Hospital South.

community rather than by placement in adult psychiatric institutions or out-of-state facilities. J.A. 65.

When this suit was filed the class members were not receiving the minimal educational or mental health services required by law. SHS did not have a child psychiatrist or a licensed specialist in child psychology on its staff. J.A. 72. In fact, SHS had no employees with the experience or qualifications to provide specialized treatment or services to emotionally and mentally disturbed children. J.A. 72. The clinical evidence showed that the condition of many of the children had not significantly improved or had actually regressed due to their inappropriate placement and the lack of adequate services. J.A. 68, 74.

SHS is primarily an adult psychiatric hospital with no special programs designed for juveniles. J.A. 72. The children confined at SHS were housed in facilities where physical contact with adult psychiatric patients was unavoidable. Many of these adult patients were committed by state courts for having illegal sexual conduct with children or were deemed mentally unfit to stand trial on charges of other criminal offenses. J.A. 63. As a result of these living and sleeping arrangements, some of the adult patients had inflicted bodily injuries on the children. J.A. 63-64.

On August 4, 1980, respondents filed a complaint against petitioners and the Superintendent of the Idaho State Department of Education ("Department of Education") seeking an injunction ordering the defendants to provide class members with appropriate educational and mental health services, to establish procedures for the development of community-based residential treatment programs and to prevent the future admission of children to the adult patient facilities at SHS. Respondents' claims were based upon the due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution, and var-

ious federal and state statutory provisions protecting the rights of the handicapped. The complaint did not request damages for injuries suffered by members of the class, but it sought injunctive relief to ensure that the children would be provided the minimally adequate services required by law. J.A. 31.

The class of indigent children was represented by Idaho Legal Aid Services, Inc. ("Idaho Legal Aid"), a private, non-profit organization that provides free legal services to qualified low-income persons. As an entity receiving grants under the Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996*l* (1982), Idaho Legal Aid is prohibited from representing individuals who are capable of paying their own legal fees. *See id.* § 2996f(b)(1); 45 C.F.R. § 1609 (1984). Thus, no fee agreement requiring respondents to pay for legal services could have been obtained. However, the complaint sought costs and attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).[2] *See* J.A. 31.

Settlement discussions began within three months after the action commenced, before substantial work had been done on the case. During the initial stages of negotiations respondents attempted to settle both the education and mental health services claims. By March 26, 1981, respondents had reached a basic agreement with the Department of Education on the need for appropriate educational services for the children, *see* Appendix to Brief of Petitioners ("Pet. App.") 2-3, and on October 19, 1981 the parties entered into a stipulation resolving all of the

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[2] 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

education-related claims. As part of its settlement proposal, the Department of Education required that respondents waive their statutory right to attorney's fees, and respondents agreed. J.A. 54.

Settlement discussions with petitioners on the mental health services claims did not proceed as smoothly. On March 26, 1981, respondents' counsel informed petitioners of significant problems with their proposed stipulation, which failed to include adequate commitments on issues of critical importance, including the establishment of individualized treatment plans prepared by a qualified mental health professional, the determination of an appropriate minimum age for admission of patients to SHS, and the segregation of patients under age twenty-one from the adult patients at SHS. Petitioners also insisted on a waiver of fees by respondents. Pet. App. 2-5. After eight months of further negotiations, counsel for both sides reached complete agreement on the medical services issues, as well as the fee waiver, but petitioners nonetheless rejected the settlement on December 18, 1981.

Respondents therefore had no alternative but to press for a judicial resolution of their claims. From December 1981 to March 1983 the litigation intensified, as respondents' counsel engaged in extensive discovery, pretrial proceedings, motions for summary judgment, and preparation for trial.[3] On July 26, 1982, the district court granted petitioners' motion for summary judgment as to some of respondents' statutory claims, but

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[3] Respondents served several sets of interrogatories, requests for production of documents, requests for admissions and written interrogatories, and took extensive depositions. Respondents also continued to press their motions for class certification and for preliminary injunctive relief. In addition, they responded to petitioners' discovery requests and motion for summary judgment, and undertook extensive trial preparations, including subpoenaing witnesses, preparing experts, outlining testimony, preparing exhibits and drafting a pretrial statement.

denied summary judgment on all other grounds, including respondents' federal constitutional claims. Contrary to petitioners' assertions, *see* Brief for Petitioners ("Pet. Br.") 9, 44, the court's order of partial summary judgment did not preclude recovery of any of the relief sought, and ultimately obtained, by respondents. *See* J.A. 31, 56. Two months after the court ruled on summary judgment, it certified the plaintiff class. J.A. 58.

In March 1983, one week before the trial was scheduled to begin, petitioners presented a new settlement proposal. This stipulation offered virtually all of the injunctive relief respondents had sought in their complaint, *Jeff D. v. Evans*, 743 F.2d 648, 649-50 (9th Cir. 1984), but demanded a complete waiver of all claims for costs and attorney's fees. J.A. 104. Respondents' counsel informed petitioners that his clients would accept the stipulation on the merits with minor additions, but strenuously objected to the paragraph demanding a waiver of attorney's fees because it unethically placed him in conflict with the interests of his clients. 743 F.2d at 650; J.A. 89.

Taking advantage of the ethical dilemma in which they had placed respondents' counsel by offering substantial relief on the merits while insisting that counsel receive no compensation, even after two and a half years of litigation, petitioners refused to withdraw the demand for a fee waiver. They did agree, however, to respondents' suggestion that the validity of the waiver be determined by the district court. The parties therefore modified the stipulation by adding the phrase "if so approved by the Court" after the fee waiver.[4]

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[4] As modified, the relevant paragraph of the stipulation read:

> 25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, *if so approved by the Court.*

J.A. 104 (emphasis added).

The parties submitted the settlement agreement, including the fee waiver, to the district court for approval pursuant to Rule 23(e). At a hearing on March 22, 1983, the district court vacated the trial date and took the matter under submission. Two weeks later, respondents filed a Motion for Consideration of Costs and Attorney Fees on Settlement. J.A. 87. At a second hearing convened on April 28, 1983, the district court approved the stipulation, J.A. 94, and on May 6, 1983 the court denied respondents' motion for costs and attorney's fees, J.A. 106.

In considering whether to allow costs and attorney's fees, the district court did not question the strength of respondents' case, nor did it suggest that respondents had not prevailed in the action by virtue of the substantial equitable relief they received in the settlement. 743 F.2d at 650. In fact, as the court of appeals observed, petitioners themselves did "not maintain that there [was] any basis, apart from the stipulation, for the denial of attorney's fees. . . . [Their] only contention [was] that the [respondents] should be bound by the stipulation waiving fees." *Id.*

The district court denied costs and fees solely on the basis of the stipulated waiver, but in approving the waiver it focused on the wrong legal and ethical issues presented by petitioners' demand. In its view, the validity of the waiver turned entirely on whether the decision of respondents' counsel would harm his clients:

> [T]he ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to [that] issue . . . .

J.A. 93. The court thus failed to recognize that by offering nearly all of the injunctive relief sought in the complaint but insisting on a fee waiver, petitioners had placed respondents' counsel in a conflict of interest with his

clients that could be resolved only by acceding to the waiver. It also failed to recognize that this tactic would enable petitioners to circumvent their statutory liability for fees and frustrate the policies Congress sought to implement by making fees available to prevailing parties under Section 1988.

Respondents appealed from the May 6 order denying costs and fees, and the Ninth Circuit reversed.[5] Although the court of appeals discussed in dictum a decision of the Third Circuit disapproving all simultaneous negotiations of merits and attorney's fees, *see Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), it reaffirmed the view held by the Ninth Circuit that the results of such fee negotiations are not "per se unacceptable." 743 F.2d at 652. However, after considering the undisputed facts of this case, the requirements of Rule 23 and Section 1988, the public policies served by attorney's fee awards in civil rights cases, and the ethical conflict created by petitioners' demand between the class lawyer's interest in compensation and the class members' interest in relief, the court concluded that the "stipulated waiver of *all* attorneys' fees obtained *solely* as a condition for obtaining relief for the class should not be accepted by the court," *id.* (emphasis added), and remanded the case for a determination of reasonable attorney's fees.

SUMMARY OF ARGUMENT

This case presents a narrow question for decision, but one that is crucial to the enforcement of the civil rights laws: whether a court in a civil rights action, in which only injunctive relief is sought, may enforce a complete waiver of plaintiffs' right to costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, where the defendant on the eve of trial

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[5] While the appeal was pending, the Ninth Circuit also ordered petitioners to abide by the terms of the stipulation and to implement the relief provided therein while appellate review was being completed. J.A. 117, 119.

has conditioned a settlement offer providing substantial relief on the merits on that waiver. Rather than addressing this fundamental issue, petitioners argue that the court of appeals should not have imposed a per se rule against "simultaneous negotiation of both merits and attorney's fees in class action settlements." Pet. Br. 7. Much of the briefing by petitioners and their amici revolves around this misconception of the case. The court of appeals, however, did not rely on a per se rule against simultaneous negotiations to support its decision. Rather, it found the fee waiver in this case contrary to the important public policies behind Section 1988, and held only that a "stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Jeff D. v. Evans*, 743 F.2d at 652.

The facts of this case show that petitioners secured a fee waiver by exploiting a conflict of interest between respondents and their counsel. Respondents are a class of indigent, mentally and emotionally handicapped children who sought to obtain lawful conditions of institutionalization by petitioners. In such cases, where indigent plaintiffs seek only injunctive relief, counsel's only opportunity for compensation lies in an award of statutory attorney's fees. Despite his interest in recovering fees, the paramount obligation of respondents' counsel was, as petitioners surely were aware, to protect the interests and special needs of his clients. On the eve of trial, after two and a half years of litigation and a previous refusal to settle, petitioners offered a settlement that provided nearly all of the merits relief sought by respondents but demanded a complete waiver of costs and attorney's fees under Section 1988. Federal courts and a number of bar ethics committees have recognized that such an offer unfairly and improperly pits the lawyer's interest in fees against his client's interest in relief on the merits. Confronted with that offer, respondents' counsel could not ethically place his own interest in compensation above his

clients' need for relief. Even to delay obtaining that relief, which included the termination of such practices as housing emotionally disturbed children with adult psychiatric patients charged with crimes, was obviously unacceptable.

But for the stipulated fee waiver, respondents would have been entitled to reasonable fees and costs under Section 1988. "[A] prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)), and a plaintiff who obtains a favorable settlement can recover fees. *See Maher v. Gagne*, 448 U.S. 122 (1980). There is no question that respondents prevailed in this case. Their class was certified, their constitutional claims withstood summary judgment, and, on the eve of trial, they obtained a settlement granting them nearly all of the relief they sought. Only by "driv[ing] a wedge" between respondents and their counsel, Pet. Br. 37, and by playing upon counsel's professional concern for his clients' interests, were petitioners able to circumvent their liability for attorney's fees under Section 1988. By coercing a waiver of respondents' federally created rights under Section 1988, petitioners' actions contravene that statute and raise significant constitutional questions.

The impact of petitioners' tactic, if upheld, would extend far beyond the denial of fees in this case. Indeed, its effect would be to undermine the policies Congress sought to implement through Section 1988. Recognizing that most "victims of civil rights violations cannot afford legal counsel," Congress authorized fee awards to "attract competent counsel" to civil rights cases and thus enable indigent plaintiffs to "present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976). Finding that "fee awards are essential" if the civil rights laws are to be "fully enforced," S. Rep. No.

1011, 94th Cong., 2d Sess., 5 (1976), Congress enacted Section 1988 to encourage private enforcement of those laws. These congressional purposes plainly would be frustrated by judicial enforcement of coerced fee waivers. If upheld, defendants will routinely demand, and obtain, fee waivers as a condition to settlement in civil rights cases. Deprived of the economic incentives intended by Congress, indigent civil rights plaintiffs seeking injunctive relief will be unable to attract competent counsel to present their claims.

The district court addressed none of the problems posed by the fee waiver in this case. It completely misapprehended the coercive nature of petitioners' demand, disregarded the impact of such a fee waiver on the purposes of Section 1988, and rubber-stamped the stipulated waiver without independently assessing, as it was required to do under Section 1988, the reasonableness of awarding no fees at all in this case. *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1929 (1984).

The court of appeals correctly reversed the district court and held that the fee waiver should not be enforced. The court plainly had authority to invalidate a provision of an agreement that is contrary to public policy, *see, e.g., McBrearty v. United States Taxpayers Union*, 668 F.2d 450 (8th Cir. 1982) (per curiam); *Restatement (Second) of Contracts* § 178 (1981), and its decision was consistent with the rulings of other courts that have set aside fee waivers as contrary to the public policy embodied in Section 1988. *E.g., Shadis v. Beal*, 685 F.2d 824 (3rd Cir.), *cert. denied*, 459 U.S. 970 (1982); *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985).

Contrary to petitioners' contention, the court of appeals also correctly declined to invalidate the entire settlement agreement. Courts have modified fee provisions

and invalidated fee waivers without disturbing the rest of the settlement agreements of which they were a part. *See, e.g., Jones v. Amalgamated Warbasse*; *Shadis v. Beal*. Moreover, the parties here recognized the questionable validity of the fee waiver and explicitly reserved the issue for the court to decide. Finally, if it was improper for petitioners to insist upon a fee waiver as a settlement condition, it would make little sense to allow them to avoid all of their obligations under the agreement on the ground that they relied on the impermissible waiver.

Petitioners and their amici suggest various alternatives to address the problems posed by coerced fee waivers, but none would be as fair and effective as the approach taken by the court of appeals. For example, they suggest that the problems posed by the type of fee waiver demanded here could be avoided by a carefully crafted retainer agreement. But even if a retainer agreement explicitly authorized respondents' counsel to decline a settlement offer that was clearly in the best interests of the handicapped children he represented, it would hardly resolve the dilemma he faced as a conscientious attorney, and it would probably be invalid.

Finally, affirming the court of appeals decision would not interfere with the legitimate interests of defendants in settling civil rights cases. Defendants could still obtain information about fees from plaintiffs, and thus assess their total potential liability. Nor would such a ruling preclude negotiation and settlement of attorney's fees. Rather, it would merely eliminate a tactic that enables defendants, contrary to Congress' intent, to avoid any liability for fees in settling meritorious civil rights suits. If the coerced fee waiver in this case is upheld, the harm will be not only to respondents here, but also to future indigent victims of civil rights violations, whose claims will go unredressed because they will be unable to secure counsel to represent them.

ARGUMENT

I. THIS CASE CONCERNS COERCIVE REQUESTS FOR FEE WAIVERS IN CIVIL RIGHTS CASES, NOT A PER SE RULE BARRING SIMULTANEOUS NEGOTIATION OF THE MERITS AND ATTORNEY'S FEES.

At the outset it is important to clarify the issues at stake. This case presents a narrow question for decision: Whether a court, in a civil rights action involving only injunctive relief, may enforce a complete waiver of costs and attorney's fees, where the defendant after two and a half years of litigation has conditioned a settlement offer providing nearly all of the relief sought by the plaintiffs on that waiver. Petitioners and their amici never come to grips with this fundamental issue. Instead, conceding that in some circumstances fee waivers are improper, *see, e.g.*, Pet. Br. 36, they contend that this Court should not impose a complete ban on "simultaneous negotiation of both merits and attorney's fees in class action settlements." *See, e.g.*, Pet. Br. 7; Brief for the United States As Amicus Curiae Supporting Reversal ("U.S. Br.") 5. That issue is simply not presented by the record or the ruling below.

Petitioners contend that the court of appeals "impos[ed] . . . a *per se* bifurcated settlement rule" and "ruled that . . . all negotiated settlements, absent unusual circumstances, must be conducted in two separate stages." Pet. Br. 10. But the Ninth Circuit made no such sweeping pronouncement. Rather, it held that the fee waiver in this case contravened the public policy reflected in Section 1988 and that the district court should not have denied attorney's fees on the basis of that waiver. The court of appeals clearly stated its precise holding:

> [A] stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class

> should not be accepted by the court. Rather, the court should make its own determination of the fees that are reasonable, giving due consideration to the appropriate factors.

Jeff D. v. Evans, 743 F.2d at 652.

That ruling is unassailable in the factual context of this case. On the merits, respondents presented substantial constitutional claims concerning the state's treatment of mentally and emotionally handicapped children. These claims withstood petitioners' motion for summary judgment. The case was certified as a class action, and the settlement offered by petitioners on the eve of trial provided nearly all of the merits relief sought by the plaintiff class. Thus, the concerns of several amici about not being able to settle "nuisance" suits do not pertain to this case. *See* p. 37 *infra*.

In addition, respondents sought and received only injunctive relief. Such cases leave plaintiff's counsel with no possibility of compensation other than an award of fees under Section 1988. This case thus does not present the validity of a "lump sum" settlement or a "sweetheart" settlement that offers high fees to tempt plaintiff's counsel to accept a lower settlement on the merits.[6] Petitioners' settlement offer, accompanied by a demand for a complete fee waiver, squarely pitted counsel's interest in compensation for his efforts against the interest of the plaintiff class in an extremely beneficial settlement. As the court of appeals recognized, the ability of defendants to exploit such a conflict in order to exact fee waivers from plaintiffs' counsel undermines the economic incentives that Congress expressly provided in Section

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[6] The interests of plaintiffs and their counsel are not as divergent where the parties negotiate a settlement providing monetary damages or a common fund. The higher the settlement amount, the higher the fees counsel might obtain from the fund. Similarly, in a standard contingent fee contract, counsel's fee is a percentage of the monetary relief the plaintiff receives.

1988 to encourage private enforcement of the civil rights laws.

Finally, this case does not involve a surprise challenge by plaintiffs to a fee waiver they had misleadingly accepted. Respondents' counsel made it clear that he believed the fee waiver was unlawful and unethical, and the parties consequently made the waiver expressly subject to court approval. *See* p. 5 & n.4 *supra*.[7]

To be sure, there are other important issues concerning the settlement of cases in which statutory attorney's fees are recoverable. Commentators have offered a variety of possible solutions to the full range of issues that might arise in such cases.[8] But this case presents only the stark issue of the validity of a fee waiver, in a case involving injunctive relief only, exacted from plaintiffs' counsel on the eve of trial as a condition to a settlement offer on the merits that was extremely favorable to his clients. For the reasons set forth below, respondents maintain that the judgment of the court of appeals invalidating that fee waiver should be affirmed.

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[7] Petitioners' suggestion, *see* Pet. Br. 47-48, that there may be "special circumstances" for denying fees on the ground that the challenge to the waiver by respondents' counsel unfairly surprised or misled them is thus unfounded.

[8] *See, e.g.*, Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 Colo. L. Rev. 341 (1984) (fee awards under Section 1988 should be non-negotiable); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 Vill. L. Rev. 597 (1984) (endorsing ban on simultaneous negotiation of merits and attorney's fees); Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law & Contemp. Probs. 293, 316-19 (1984) (endorsing post-settlement invalidation of fee waivers as contrary to public policy); Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793 (1983) (endorsing discontinuance of simultaneous negotiations only upon request of plaintiff's counsel).

II. IN ENACTING SECTION 1988, CONGRESS DETERMINED THAT AWARDS OF ATTORNEY'S FEES WERE ESSENTIAL TO PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS.

The legislative history of Section 1988 makes its purpose plain: the statute was intended to facilitate private enforcement of civil rights laws by enabling prevailing plaintiffs to recover costs and attorney's fees. The Act was passed in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that federal courts could not award attorney's fees to a prevailing party absent explicit congressional authorization. Testimony before Congress "indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) ("House Report"). The House Report stated that civil rights "plaintiffs were the hardest hit by the decision," and specifically noted that "private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." *Id.* at 3. Section 1988 was intended to remedy this problem.[9]

The legislative history emphasized Congress' finding that, if civil rights plaintiffs could not recover attorney's fees, they would go unrepresented and civil rights violations would go unredressed. The House Judiciary Com-

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[9] Emphasizing that Section 1988 was intended to achieve uniformity in federal civil rights laws, petitioners suggest that this goal was an implicit endorsement of fee waivers because such waivers were permissible under existing fee provisions in other civil rights statutes. *See* Pet. Br. 13-14. The cases cited by petitioners do not show that fee waivers were permissible. *See* p. 26 n.25 *infra*. In any event, the uniformity sought by Congress concerned the effect of this Court's decision in *Alyeska*, which "created anomalous gaps in our civil rights laws whereby awards of fees [were] . . . suddenly unavailable" in actions under those civil rights statutes that lacked a fee provision. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976).

mittee found that "a vast majority of the victims of civil rights violations cannot afford legal counsel" and are therefore "unable to present their cases to the courts." House Report, at 1. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) ("Senate Report") (many civil rights plaintiffs "who must sue to enforce the law ha[ve] little or no money with which to hire a lawyer"). By authorizing recovery of attorney's fees, Section 1988 gave "such persons effective access to the judicial process where their grievances can be resolved . . . ." House Report, at 1.

Congress found the need for recovery of attorney's fees "pressing" and "compelling." *See* House Report, at 3. The Senate Judiciary Committee stressed that the "civil rights laws depend heavily upon private enforcement," Senate Report, at 2, and that "fee awards are essential" if the civil rights laws "are to be fully enforced." *Id.* at 5. *See id.* at 2 ("fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies" in the civil rights laws). Congress also viewed fee awards as a critical deterrent to civil rights violations. The Senate Judiciary Committee stressed that fee awards are necessary "if those who violate the Nation's fundamental laws are not to proceed with impunity . . . ." Senate Report, at 2. *See id.* at 5 ("fee awards are an integral part of the remedies necessary to obtain . . . compliance" with civil rights laws).[10]

Congress specifically focused on civil rights cases in which damages might be unavailable, noting that

> awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if

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[10] Congress also recognized that the less desirable alternative to vigorous private enforcement of the civil rights laws was increased enforcement by the government. *See id.* at 4 ("fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy").

> Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by [the bill], only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

House Report, at 9. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam); *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983).

This case epitomizes Congress' concerns. A class of emotionally and mentally handicapped children obviously does not have the funds to hire private lawyers and finance this type of litigation.[11] Only with legal representation provided without fee by Idaho Legal Aid were respondents able to prosecute successfully their injunctive claims and secure conditions and services required by law. Respondents' counsel had every reason to believe they would be able to recover costs and fees if they prevailed at trial or through settlement.[12] Instead, petitioners compelled respondents' lawyers to forego compensation as part of a settlement offer providing nearly all of the merits relief the class sought. If one of the results

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[11] In enacting the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j (1982), Congress recognized that institutionalized persons are in dire need of legal representation to protect their basic civil rights:

> Most institutionalized persons are poor; many are indigent; none possesses the resources necessary to finance litigation challenging systematic, institution-wide abuse. The cost of hiring experts to investigate, document, evaluate, and present testimony on the adequacy of institutional conditions is beyond the means of the most affluent institutionalized individuals.

S. Rep. No. 416, 96th Cong., 1st Sess. 20 (1979).

[12] Congress made it clear that legal services organizations could recover fees under Section 1988. *See* House Report, at 8 n.16; *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980); *Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980).

of successfully settling civil rights cases is a waiver of costs and fees, the financial ability of Idaho Legal Aid, or indeed any attorney, to represent future civil rights claimants will be seriously undermined.

III. PETITIONERS WERE ABLE TO EXACT A FEE WAIVER BY IMPROPERLY CREATING AND EXPLOITING A CONFLICT OF INTEREST BETWEEN RESPONDENTS AND THEIR COUNSEL.

The serious threat to the purposes of Section 1988 derives from the unique ability of defendants in petitioners' position to exploit a conflict of interest between plaintiffs and their counsel. Under the American Bar Association's Model Code of Professional Responsibility ("Model Code"),[13] a lawyer has a fiduciary obligation to protect the interests of the client. The lawyer's undivided loyalty to his client cannot be diluted by his "personal interests," and his professional judgment must be exercised "solely for the benefit of his client and free of compromising influences and loyalties." EC 5-1; *see* Model Rule 1.7(b). Accordingly, an attorney is required to evaluate a settlement offer purely on the basis of his client's interest, without considering his own interest in obtaining a fee. *See* EC 7-7 ("it is for the client to decide whether he will accept a settlement offer"); Model Rule 1.2(a) ("lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"). The attorney's entitlement to seek fees under Section 1988 does not lessen his duty "always to act in a manner consistent with the best interests of his client," EC 7-9, and to provide disinterested counsel to his client. A favorable settlement offer coupled with a fee waiver de-

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[13] The State of Idaho has adopted standards of professional ethics very similar to the Model Code, which was adopted by the American Bar Association in 1969. In August 1983 the American Bar Association adopted the Model Rules of Professional Conduct. The Model Rules and the Model Code equally support the reasoning set forth herein.

mand thus directly pits the attorney's economic interests against the client's interests.[14]

The "cruel dilemma" faced by an attorney confronted with such a settlement offer conditioned on a fee waiver, *Freeman v. B & B Associates*, 595 F. Supp. 1338, 1342 (D.D.C. 1984), *appeal docketed*, No. 85-5239 (D.C. Cir. Mar. 11, 1985), is particularly acute in the circumstances of this case. On the one hand, the lawyer's interest in recovering fees under the statute is at its height. As is often true in civil rights cases, respondents' counsel had no expectation of being paid by the indigent children he represented. Moreover, as in any case involving equitable relief only, the relief obtained cannot provide any compensation for the attorney.

On the other hand, the attorney here has special obligations to protect his client's interests. Counsel is obligated under Fed. R. Civ. P. 23 to represent adequately the interests of the absent class members as well as the named plaintiffs. Representing a class of mentally and emotionally handicapped children "casts additional responsibilities upon [the] lawyer" to "act with care to safeguard and advance the interests of his client." EC 7-12; *see* Model Rule 1.14. These ethical obligations precluded respondents' counsel from rejecting petitioners' settlement offer, which provided immediate relief for children in need. Respondents' interest in promptly ending such practices as placing emotionally disturbed children with adult sex offenders properly dictated his decision. Petitioners surely knew that respondents' counsel could not ethically turn down their settlement offer in

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[14] The Legal Services Corporation Act specifically provides that legal services attorneys "must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6).

order to protect his fees, and they placed him in that position solely to avoid their liability under Section 1988.[15]

Courts have widely recognized the ethical problems inherent in settlement offers conditioned on fee waivers. Justice Powell pointed out the conflict of interest inherent in an offer of judgment under Rule 68 that does not include costs and attorney's fees:

> An offer to allow judgment that does not cover accrued costs and attorney's fees is unlikely to lead to settlement. Many plaintiffs simply could not afford to accept such an offer. It may be, also, that the plaintiff's lawyer instituted the suit with no hope of compensation beyond recovery of a fee from the defendant. Such a lawyer might have a conflict of interest that would inhibit encouraging his client to accept an otherwise fair offer.

Delta Air Lines, Inc. v. August, 450 U.S. 346, 364 (1981) (Powell, J., concurring).[16] Other courts have recognized the same problem in demands for waivers of fees under Section 1988.[17]

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[15] Petitioners contend that it would be "anomal[ous]" to bar a waiver of the right to attorney's fees under Section 1988 since constitutional rights of defendants in criminal cases can be waived. *See* Pet. Br. 14 n.3. This argument completely ignores the coercive nature of the fee waiver demanded here. Cases are legion in which this Court has emphasized that a waiver of constitutional rights must be "voluntary" as well as "knowing and intelligent," *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (right to counsel), and not "coerce[d]" or "compelled." *Lefkowitz v. Turley*, 414 U.S. 70, 79-83 (1973) (privilege against self-incrimination).

[16] *See Freeman v. B & B Assoc.*, 595 F. Supp. 1338, 1342 (D.D.C. 1984) (offer of judgment conditioned on fee waiver allows defendant "to squeeze an attorney and his client into a situation where an attorney can only be assured of an opportunity for a fee by jeopardizing a settlement otherwise advantageous to his client"), *appeal docketed*, No. 85-5239 (D.C. Cir. Mar. 11, 1985).

[17] *See, e.g., Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1100, 1103 (D.C. Cir. 1985) (petition for rehearing held in abeyance pending outcome of this case); *Lazar v. Pierce*,

Petitioners and their amici suggest that *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), supports their position. In *White*, the Court held that a post-judgment fee motion was not a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment on the merits. That the Court "decline[d] to rely on" an alternative argument that negotiation of attorney's fees should be deferred until after judgment on the merits hardly supports petitioners' contention that conditioning a settlement offer on a waiver of fees is permissible. Indeed, the Court acknowledged that simultaneous negotiation of fees and merits "may raise difficult ethical issues for a plaintiff's attorney." 455 U.S. at 454 n.15.[18]

A number of bar ethics committees have also acknowledged the ethical problems presented by fee waiver demands. The Ethics Committee of the New York City Bar Association has recognized that, because of his ethi-

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757 F.2d 435, 438 (1st Cir. 1985); *Obin v. District No. 9 Int'l Ass'n of Machinists*, 651 F.2d 574, 582-83 (8th Cir. 1981); *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985); *Regalado v. Johnson*, 79 F.R.D. 447, 451 (D. Ill. 1978).

The State Amici make much of the fact that Section 1988 authorizes an award of fees to a prevailing party, and not directly to counsel, suggesting that any conflict of interest between attorney and plaintiff over recovery of fees was not objectionable to Congress. *See* Brief of Alabama, et al., Amici Curiae In Support of Petitioners ("States Br.") 19-22. But Congress made it clear that fee awards were intended "to attract competent counsel" to civil rights cases, House Report, at 9, and courts have recognized that "a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney." *Regalado v. Johnson*, 79 F.R.D. 447, 451 (D. Ill. 1978); *see James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1358 (11th Cir. 1982).

[18] Petitioners' reliance on a statement in *White* that "a defendant may have good reason to demand to know his total liability from both damages and fees," 455 U.S. at 454 n.15, is misplaced since petitioners here did not seek any information on liability for fees but insisted upon a complete fee waiver. *See* p. 37 *infra*.

cal obligations to the client, plaintiff's counsel "must ignore his or his organization's interest in a fee and recommend waiver of the fee, if the substantive terms of the settlement are desirable for the plaintiff." Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94 at 4, *reprinted in* 36 Record of New York City Bar Assoc. 507 (1981).

> Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest.

Id. Noting that statutory fees are "critical to the administration of justice," *see* DR-102(A)(5), the Committee concluded that "it is unethical for defense counsel to exploit this situation in cases arising under statutes aimed at protecting civil rights and civil liberties." *Id.*[19] The District of Columbia Bar adopted the same analysis. District of Columbia Bar Legal Ethics Committee, Op. No. 147, *reprinted in* 113 Daily Wash. Law Rep. 389 (1985); *see also* Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17 (1981) (unethical to negotiate fees prior to settlement of the underlying action where statutory fees are available).[20]

The district court here utterly failed to comprehend the conflict of interest created by petitioners' settlement offer conditioned on a fee waiver. The court stated that "the

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[19] The Committee also noted the special obligation of government attorneys under EC 7-14 not to use their position or the power of the government "to bring about unjust settlements or results."

[20] State Bar of Georgia, Op. No. 39, *reprinted in* 10 Georgia State Bar News 5 (1984) (see Pet. Br. 18), merely authorizes lump sum settlement offers, without considering fee waivers in injunctive relief cases.

ethical considerations run only to the issue" of whether "the attorney in the process of bargaining [is] out to depreciate his client's claim or to proceed in a manner that will be unfair to his client." J.A. 93. Presumably, the district court would have recognized the conflict if respondents' counsel had refused the settlement offer by placing his own interest in obtaining a fee above the interests of his clients. The conflict created by petitioners did not disappear simply because counsel recognized his ethical duty and accepted the offer.

Petitioners ultimately do not dispute that their conduct created a serious conflict of interest for respondents' counsel. They merely contend that, "in light of these alleged conflict of interest problems," "a *per se* bifurcated settlement rule is not appropriate." Pet. Br. 11, 20; *see also* U.S. Br. 22 (conditional settlement offers are "not ipso facto indicative of bad faith or unethical conduct"). Whether or not a *per se* rule is appropriate, on the facts of this case it was improper for petitioners to use their conditional settlement offer to "drive[] a wedge between [the] plaintiffs and plaintiff's counsel," Pet. Br. 37, and exploit that conflict of interest to evade their statutory liability for fees.[21]

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[21] Petitioners rely on the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit, *reprinted in* 13 Bar Rep. 4 (1984), but that report simply declined to adopt a flat rule prohibiting simultaneous settlement of the merits and attorney's fees. Moreover, the Report offered two examples suggesting that the fee waiver in this case would be considered improper. First, the Committee indicated that a lump sum settlement offer would be proper in a Title VII case "in which the only issue is money, and the defendant believes that the plaintiff's case is very weak." *Id.* at 6. By contrast, in a Freedom of Information Act case, it would be improper for government counsel to condition release of the requested documents upon a waiver of attorney's fees. "That situation presents a grossly unfair choice to the plaintiff and his/her counsel, and permitting such offers to be made would seriously undermine the purpose of fee shifting provi-

IV. THE COURT OF APPEALS PROPERLY INVALIDATED THE FEE WAIVER AS CONTRARY TO SECTION 1988 AND THE PUBLIC POLICIES IT EMBODIES.

A. The Fee Waiver In This Case Contravened Section 1988 And Its Underlying Purposes, And The Court Of Appeals Correctly Invalidated It.

By offering to provide nearly all of the relief sought by respondents, but conditioning the offer on a complete waiver of attorney's fees, petitioners placed respondents' counsel in a conflict of interest that could only be resolved by acceptance of the settlement and the fee waiver. On the facts of record there is no doubt that, but for that waiver, respondents would have been entitled to an award of some fees under the statute. *See* pp. 34-35 *infra*. Thus, petitioners' conditional settlement offer enabled them to circumvent entirely their potential liability for fees and effectively negated the operation of Section 1988 in this case.[22]

The effect of the tactic used by petitioners, however, extends far beyond the confines of this case. In any civil rights case in which indigent plaintiffs seek injunctive relief only, a defendant can evade liability for at-

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sions." *Id.* In light of these examples, it seems highly unlikely that the D.C. Circuit Committee would approve of government counsel's conditioning a settlement providing the equitable relief requested by respondents here on a waiver of fees.

[22] Where Congress has guaranteed citizens a federal right, states may not interfere with the individual exercise of that right. *See Johnson v. Avery*, 393 U.S. 483 (1969); *see also Bounds v. Smith*, 430 U.S. 817, 834 (1977) (Burger, C.J., dissenting). Plainly, the state could not pass a statute precluding payment of attorney's fees in certain types of civil rights cases to which Section 1988 applies. Yet, petitioners and their amici suggest that they may be obliged routinely to demand fee waivers in an effort to reduce their total liability. *See* Pet. Br. 31-32; States Br. 53. Petitioners should not be permitted to "accomplish indirectly . . . that which cannot be done directly." *Williams v. Illinois*, 399 U.S. 235, 243 (1970).

torney's fees under Section 1988, even after years of litigation and no matter how strong the plaintiff's case, by offering subtantial relief on the merits coupled with a fee waiver demand. Because this tactic plays on counsel's concerns for the interests of his clients, it is especially effective where, as in this case, plaintiffs are institutionalized children who are in serious need of the relief they seek. Such coerced fee waivers plainly contravene Congress' purposes in enacting Section 1988. As the First Circuit has aptly stated:

> [F]or a defendant to require [plaintiff's counsel] to forgo his fee (the instant case being a classic example, since the so-called settlement provided no available funds, and, by hypothesis, the client was indigent) or to attempt to negotiate an unreasonable fee, by playing upon counsel's concern for his client, is contrary to the very intendment of the Act.
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> . . . If counsel can forsee themselves subject to being euchred out of their fee, even though successful, the Congressional purpose will, pro tanto, be frustrated.

Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985).[23]

Demands for fee waivers in civil rights cases are already commonplace.[24] Petitioners and their amici go so far as to suggest that defense counsel may be ethically obliged to demand such a waiver. *See* Pet. Br. 32; States Br. 51-53. If this Court endorses the practice, fee waivers will always be demanded by defendants as a settlement condition in civil rights cases. "No matter how sophisti-

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[23] The court in *Lazar* declined to allow plaintiff's counsel to recover fees, not because it approved of the fee waiver, but because plaintiff's counsel, unlike respondents' counsel here, entered the consent decree without informing the opposing parties of his intention to challenge the fee waiver provision. 757 F.2d at 437, 439. *See* p. 29 n.29 *infra*.

[24] The national staff counsel for the ACLU has estimated that requests for fee waivers are made in more than half of all civil rights cases litigated. *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A.J. 23 (1982).

cated the analysis of attorney responses becomes, the conclusion remains that the more we decrease the reasonable expectation of Fees Act awards, the less likely it is that Fees Act cases will be initiated." Kraus, *supra*, 29 Vill. L. Rev. at 637. Congress' goal of encouraging private enforcement of the civil rights laws by providing for recovery of fees and costs under Section 1988 clearly would be undermined by sanctioning the fee waiver at issue here.[25]

In these circumstances, there can be no doubt that the court of appeals was correct in concluding that the "waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted . . . ." *Jeff D. v. Evans*, 743 F.2d at 652. Nor is there any question that the court had authority to set aside the coerced fee waiver as contrary to the public policy embodied in Section 1988. It is well-established that federal courts may void contractual provisions that contravene public policy. *E.g.*, *McBrearty v. United States Taxpayers Union*, 668 F.2d 450 (8th Cir. 1982) (per curiam); *see generally* 6A A. Corbin, *Contracts*

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[25] Searching for some indication that such fee waivers are permissible, petitioners argue that when Congress passed Section 1988, it "must be presumed to have known" about two district court cases supposedly "interpret[ing] Titles II and VII to allow plaintiffs to waive attorney's fees," Pet. Br. 13, and that Congress implicitly endorsed those decisions by its silence on this issue. Apart from the strained logic of this proposition, the decisions cited by petitioners did *not* authorize a fee waiver. In one case, a settlement agreement specifically reserved the question of attorney's fees for resolution by the court. Unable to determine from the settlement agreement whether plaintiffs were in fact "prevailing parties," the court asked the parties to address this issue. *See Clanton v. Allied Chem. Corp.*, 409 F. Supp. 282, 284-85 (E.D. Va. 1976). In the other case, the court affirmed one award of attorney's fees under a settlement agreement and declined to award fees to another attorney because it determined that he was not entitled to them under the statute. *Leisner v. New York Tel. Co.*, 398 F. Supp. 1140 (S.D.N.Y. 1974).

§ 1375 (1962 & Supp. 1984). The *Restatement (Second) of Contracts* § 178 (1981) specifically provides that:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

In determining whether a provision of an agreement contravenes public policy, Section 178 looks to "the strength of that policy as manifested by legislation or judicial decisions" and "the likelihood that refusal to enforce the term will further that policy." *Id.* § 178(3)(a), (b).[26]

Relying on the Restatement, the Third Circuit in *Shadis v. Beal*, 685 F.2d 824 (3rd Cir.), *cert. denied*, 459 U.S. 970 (1982), invalidated as contrary to public policy a contract provision in which a legal services organization waived any right to request or receive legal fees in actions against the Commonwealth of Pennsylvania. The court stated that "Congress expressed unambiguously the significance it attached to the attorneys' fees provisions, and we conclude that the public policy embodied in § 1988 is a vital one." *Id.* at 831.[27] The court held the offending provision void, finding that "[i]f the Commonwealth could insert and enforce the no fees restraints in its contracts, the policy of economic

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[26] Section 178 also requires consideration of "the seriousness of any misconduct involved and the extent to which it was deliberate" and "the directness of the connection between that misconduct and the term." *Id.* § 178(3)(c), (d).

[27] The Restatement does not require an express prohibition of the contract term; rather, "it is sufficient if the legislature makes an adequate declaration of public policy which is inconsistent with the contract's terms." *Shadis*, 685 F.2d at 833-34 (citing *Restatement (Second) of Contracts* § 179, Comment (b) ("[a] court . . . will look to the purpose and history of the statute")).

inducement sought by Congress would be severely impaired." *Id.*

Courts in a variety of circumstances have refused to give effect to a waiver of a plaintiff's right to recover fees. They have specifically held fee waivers demanded as a settlement condition unenforceable as contrary to the principles of Section 1988, just as the Ninth Circuit held in this case. *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985); *see Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983) (court ordered parties to conduct settlement negotiations on the merits and fees separately where defendant had demanded fee waiver as a settlement condition); *cf. Mitchell v. Johnston*, 701 F.2d 337, 351 (5th Cir. 1983) (court may not condition *pro hac vice* admission of plaintiff attorneys on waiver of their right to seek fees under Section 1988). *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 317-18 (1984).[28]

In other contexts, courts have refused to find that plaintiffs' attorneys had waived their right to seek attorney's fees under the statute. For example, a settlement agreement that is silent on attorney's fees has not been viewed as an implicit waiver barring recovery of fees. *See, e.g., El Club Del Barrio, Inc. v. United Community Corps.*, 735 F.2d 98 (3d Cir. 1984). Similarly, the existence of a contingent fee agreement between counsel and plaintiffs has not been considered a waiver of the right to recover fees under Section 1988 in excess of the contingency amount. *See, e.g., Cooper v. Singer*, 719

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[28] Courts have also protected the purposes of fee-shifting provisions in other statutes. *See, e.g., James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1359 (11th Cir. 1982) ("Congress could not have intended" to allow settling defendants to demand fee waivers under Truth in Lending Act since "[s]uch a result would enable [defendants] . . . to escape liability for attorney's fees . . . [and] would thwart both the statute's private enforcement scheme and its remedial objectives").

F.2d 1496 (10th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982).

In short, most courts confronting fee waivers have been true to the purposes of Section 1988. "Recognizing Congress' clear signals to apply the Act 'broadly to achieve its remedial purpose,'" *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980) (quoting *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978)), they have not permitted fee waivers to undermine Congress' intent to provide the necessary economic incentives for lawyers to represent indigent civil rights plaintiffs.[29]

Disregarding this precedent and the especially coercive nature of the fee waiver at issue here, the district court simply enforced the waiver without even considering whether it would contravene the purposes of Section 1988.[30] The district court also erred by failing to make

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[29] Petitioners' reliance on *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985) (petition for rehearing held in abeyance pending outcome of this case), is misplaced. The court in *Moore*, which specifically found this case distinguishable, 762 F.2d at 1102, held only that "plaintiffs may, voluntarily and on their own initiative, offer a waiver or concession of possible claims for fees and costs in an effort to encourage settlement." *Id.* at 1105. The court stressed this limitation on its ruling, *see id.* at 1105 n.17, 1110, as did Judge Wald's concurring opinion. *Id.* at 1112-13. It is clear in this case that respondents' counsel did not voluntarily and on his own initiative offer a fee waiver. The court in *Moore* also noted that the plaintiff "understood she had a weak case on the merits." *Id.* at 1107. Moreover, as in *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985), a critical aspect of the decision in *Moore* was the failure of plaintiff's counsel to inform the defendants or the court of his objections to the fee waiver. *See* 762 F.2d at 1111 (Wald, J., concurring) (stressing that plaintiff's counsel "unequivocally" informed the district court "that the waiver was fully voluntary").

[30] Petitioners' contention that the district court did not deny fees solely on the basis of the waiver provision in the settlement agreement is defied not only by the district court's decision, J.A. 93-94, but by petitioners' failure even to argue in the district court

any independent determination under Section 1988 of the reasonableness of denying all fees in this case.[31] In view of these legal errors and the plain threat to the statute, the court of appeals correctly reversed the district court's decision to enforce the fee waiver.[32]

B. Petitioners' Alternatives To The Approach Of The Court Of Appeals Would Not Resolve The Problems Posed By The Coerced Fee Waiver.

Petitioners and their amici argue that there are a number of alternative solutions short of invalidating coerced fee waivers that would deal with the problems presented here. They suggest, for example, that the problems posed by a fee waiver demanded as a settlement condition should simply be worked out between plaintiffs and their counsel through a carefully crafted retainer agree-

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that respondents' motion for fees could be denied on any other basis. *See* p. 6 *supra*.

[31] *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) ("[t]he presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval, but such an agreement is not binding on the court"), *cert. denied*, 104 S. Ct. 1929 (1984); *Gillespie v. Brewer*, 602 F. Supp. 218, 226 (N.D.W.Va. 1985) (despite fee waiver clause in settlement agreement, court made its own determination that fees should be awarded and held that the "clause violates public policy and is unenforceable"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 628 (N.D. Cal. 1979) ("[t]his Court has made it abundantly clear that it alone has the authority to determine whether and how much attorneys' fees will be awarded in this case, and that it will not be bound by any agreements between the parties regarding fees"); *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 687 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) (per curiam); *cf. Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (in determining reasonable fees under Section 1988, courts are not bound by contingent fee agreement).

[32] Since the district court's decision on the validity of the fee waiver was based on legal errors, petitioners' contention that the court of appeals erred by reversing without finding that the district court abused its discretion is mistaken.

ment. *See, e.g.*, Pet. Br. 33-34; U.S. Br. 7, 25. The dilemma faced by a conscientious plaintiff's attorney confronted with a very favorable settlement offer conditioned on a fee waiver would not be resolved by the existence of a retainer agreement authorizing the attorney to act against the interests of his client. Moreover, such a retainer agreement would be of questionable validity at best,[33] particularly when the clients are mentally and emotionally handicapped minors.

Petitioners also suggest that a district court can use its authority under Rule 23(e) and Rule 16 to intercede in settlement negotiations in which there are allegations of unethical conduct by defendants.[34] But requiring plaintiff's counsel to go to the judge during the negotiations is almost certain to be ineffective. If plaintiff's counsel cannot risk losing a favorable settlement by refusing to acceed to a demanded fee waiver, he will also be unable to risk withdrawal of the settlement offer by seeking the court's intervention. It is not clear what relief a district court could provide that would assist plaintiff's counsel without harming the interests of his clients that he seeks to protect.[35]

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[33] As one commentator has noted: "Any retainer provision which may be construed as a limitation on the ability of the client to settle is likely to be declared invalid. An attorney cannot insist, for example, on a right to participate equally with the client in determining the propriety of settlement." *Calhoun, supra*, 55 Colo. L. Rev. at 354. *See* EC 7-7; Model Rule 1.2(a). Further, "a contingent fee agreement cannot bind members of a class represented by an individual plaintiff and, therefore, is not an effective solution for class action." 55 Colo. L. Rev. at 356.

[34] Specifically, they suggest that the court use a magistrate or a special master or "appoint a guardian *ad litem* to protect the interests of plaintiffs." Pet. Br. 37.

[35] Moreover, in reviewing a settlement of a class action under Rule 23(e), the district court's obligation is primarily "to protect the nonparty members of the class from unjust or unfair settlements affecting their rights," 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1797, at 226 (1972), not to protect the interests of plaintiff's counsel.

Finally, petitioners urge this Court to create a presumption that defense counsel has acted in good faith, which plaintiffs would have to overcome in order for the district court to invalidate a fee waiver. Pet. Br. 36. Similarly, the Acting Solicitor General suggests that plaintiffs must meet a threshold burden of demonstrating the "bad faith" of defense counsel. U.S. Br. 27. But the defendant's good or bad faith is not the concern. Petitioner's demand for a fee waiver as a condition of a favorable settlement offer here is improper because it undermines Section 1988. This holds true even if a defendant's motivation is simply to save money by avoiding paying fees.[36] Moreover, Congress did not intend fee awards against state defendants to depend on a showing of bad faith, *see* Senate Report, at 5 n.7; *Hutto v. Finney*, 437 U.S. 678, 693 (1978), and it would be inconsistent with that intent and highly inefficient to require the court to hold a hearing on petitioners' state of mind in determining whether fees are available. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("[a] request for attorney's fees should not result in a second major litigation").[37]

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[36] The technique of exploiting a conflict of interest to exact a fee waiver in the circumstances of this case does, in any event, indicate bad faith, although neither petitioners nor the Solicitor General clearly define the standard. Petitioners concede that a plaintiff's burden of showing bad faith "would ordinarily be met when an offer, on its face, makes a 'totally inadequate provision for class counsel.'" Pet. Br. 36. Clearly the absolute waiver demanded here after two and a half years of litigation meets this test.

[37] Other "solutions" suggested by amici, such as providing notice to absent class members and allowing the settlement process itself to work out any problems, *see* States Br. at 57-58, would provide no help to plaintiff's counsel and no protection for the long-term interests of civil rights plaintiffs. The suggestion that the problem lies exclusively in the domain of state bar ethics committees, *see* Brief of the Council of State Governments, Amicus Curiae, *et al.*, 20, overlooks the power and the obligation of federal courts to determine when an award of fees is appropriate under Section 1988 and to preserve the purposes of that statute. *See* pp. 24-30 *supra*.

The court of appeals decision on the facts of this case provides a far more workable standard: where plaintiffs have a substantial claim on the merits for injunctive relief only, a fee waiver exacted by a defendant as a condition to a favorable settlement offer contravenes public policy and is therefore invalid.

C. The Court Of Appeals Correctly Declined To Invalidate The Entire Settlement Agreement.

Petitioners and their amici argue that, having found the fee waiver invalid, the court of appeals was obligated to invalidate the entire settlement agreement and remand the case to the district court for further proceedings. But federal courts have frequently modified fee provisions in settlement agreements without even questioning the validity of the rest of the agreement. *See, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1929 (1984). Specifically, courts have held fee waiver provisions void as contrary to public policy while leaving the rest of the contract or settlement agreement intact. *E.g., Shadis v. Beal*, 685 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 970 (1982); *Gillespie v. Brewer*, 602 F. Supp. 218 (N.D. W. Va. 1985). *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 318 ("[t]he courts' general approach is to invalidate the entire contract only when the offending clause is an integral part of the contract and its excision makes the remainder of the contract impossible or seriously difficult to perform"); *Restatement (Second) of Contracts* § 184 (1981).

Petitioners' contention that the entire settlement agreement must fall is hardly surprising. Whenever a defendant has demanded a fee waiver as part of a settlement offer, gambling on the validity of the waiver, the defendant will contend that the agreement should fall in its entirety if the waiver is struck down. If it was wrong, however, for petitioners to demand a fee waiver as a

settlement condition in the circumstances of this case, it certainly would not be a proper remedy to allow petitioners to avoid their obligations under the rest of the agreement on the ground that they relied on the impermissible waiver. *See* Wolfram, *supra*, 47 Law & Contemp. Probs. at 318. Here, it was particularly appropriate for the court to hold the fee waiver invalid without disturbing the rest of the settlement agreement, since the agreement explicitly reserved the question of the waiver's validity for the court. *See* J.A. 104; p. 5 & n.4 *supra*. Since the entire settlement agreement had to be approved by the court under Rule 23(e), the inclusion of this language only in the fee waiver clause indicates that the court was to deal with the fee waiver provision separately.

Petitioners also contend that, even if the fee waiver was properly held invalid, the court of appeals should not have remanded for a "determination" of attorney's fees, since the district court could still deny *any* fees to respondents. In seeking such a remand, petitioners ask this Court to shut its eyes to the facts of this case. It is well established that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (quoting in turn *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))). *See El Club Del Barrio, Inc. v. United Community Corps.*, 735 F.2d 98, 100 (3d Cir. 1984) (recognizing the "presumption established in *Hensley* and *Piggie Park*" that prevailing plaintiffs should be awarded fees). It is equally plain that a plaintiff who enters a favorable settlement can recover fees, *see, e.g., Maher v. Gagne*, 448 U.S. 122 (1980); House Report, at 7, and that "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley*, 461 U.S. at

433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Simply put, "[t]he result is what matters." 461 U.S. at 435.[38]

There is simply no basis in the record for suggesting that respondents are entitled to no fees at all under the appropriate standards. *See* p. 6 *supra*. Neither in the district court, in response to the motion for costs and attorneys' fees, nor in the court of appeals, did petitioners contend that respondents were not "prevailing parties" or "maintain that there [was] any basis, apart from the stipulation, for the denial of attorneys' fees. . . . The [petitioners'] only contention [was] that the [respondents] should be bound by the stipulation waiving fees." *Jeff D. v. Evans*, 743 F.2d at 650.[39]

V. BARRING COERCED FEE WAIVERS WOULD NOT INTERFERE WITH THE LEGITIMATE INTERESTS OF DEFENDANTS IN SETTLING CIVIL RIGHTS SUITS.

Contrary to the assertions of petitioners and their amici, an affirmance in this case would not interfere with the public policy in favor of settling civil rights suits. If this Court makes it clear that coerced fee waivers will not be enforced, there will be a strong incentive to settle

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[38] *Hensley* stressed that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention in the lawsuit. . . . [T]he court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. The district court's granting summary judgment against respondents on certain claims thus provides no basis for denying fees, particularly since it left the core constitutional claims intact.

[39] Having never raised the argument below that respondents are otherwise not entitled to attorneys' fees under Section 1988, petitioners should not be permitted to raise this argument for the first time in this Court. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1492 n.5 (1985).

at an early stage rather than run the risks of neglecting settlement, going to trial, and incurring much larger fees after the case has been fully litigated. By contrast, if defendants know that a fee waiver will be upheld, the lack of any potential liability for fees will provide an incentive to delaying settlement. More importantly, to the extent coercive fee waiver demands promote settlement, it is only because defendants are allowed to "drive[] a wedge between . . . plaintiffs and plaintiff's counsel," Pet. Br. 37, to eliminate their liability under Section 1988. A tactic that "promotes" settlement, but fosters conflicts of interest, denies reasonable compensation to attorneys and undermines the purposes of a federal statute is contrary to public policy and should not be tolerated.[40]

Relying on *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454 n.15 (1982), petitioners and their amici argue that a defendant has a "right to know" its total liability, including potential liability for attorney's fees. The ruling sought by respondents would not preclude a defendant from seeking fee information from plaintiffs or from negotiating an agree-

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[40] The Acting Solicitor General's contention that invalidating the fee waiver in this case would somehow discourage settlements in cases under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) ("EAJA"), is unpersuasive. *See* U.S. Br. at 13-14. The EAJA obligates the Government to pay counsel fees only when "the position of the United States was not substantially justified," 28 U.S.C. § 2412(d)(1)(B), whereas Section 1988 authorizes a fee award to a prevailing plaintiff even if the defendant took a substantially justified position. The higher threshold for obtaining fees under the EAJA makes it less likely that an attorney's decision to represent a party will be premised upon an expectation that his compensation will come from a fee award. In any event, the Government should not be permitted to circumvent its liability under the EAJA by demanding a fee waiver after litigating against its citizens without "substantial[] justifi[cation]."

ment on fees subject to court approval.[41] Petitioners never inquired into the amount of time respondents' attorneys spent on the case or made any effort to determine their potential liability for fees. They were only interested in obtaining an absolute fee waiver as a condition to a stipulation on the merits.

It is also unrealistic to assume that a defendant has no way of calculating the amount of attorney's fees a plaintiff will ultimately be awarded. Recent decisions of this Court on fee calculations make a reasonable estimate possible. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("the number of hours reasonably expended . . . multiplied by a reasonable hourly rate . . . provides an objective basis on which to make an initial estimate" of fees).[42]

Petitioners and several of their amici contend that fee waivers are necessary to settle "nuisance suits," which defendants may be willing to settle only if they can avoid liability for attorney's fees. Once again, this concern is not at issue here. Respondents pressed substantial constitutional and statutory claims concerning the treatment of emotionally and mentally disturbed children, and any suggestion that their suit was frivolous is belied by petitioners' decision to provide almost all of the injunctive relief sought. In any event, a fee waiver in the settlement of a true nuisance suit may be upheld under Section 1988,

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[41] *See* Committee on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. No. 82-80 (1984) (defendants' counsel in civil rights cases ethically may request that plaintiffs' counsel supply fee information for estimating defendants' total liability).

[42] The Court also focused on the results obtained by plaintiffs, *see* 461 U.S. at 435, a factor which should be as apparent to defendants as to plaintiffs. Moreover, this and other factors affecting fee calculations often will be reflected in the hourly rates and the hours expended. *See Blum v. Stenson*, 104 S. Ct. 1541, 1548-50 (1984); *Hensley*, 461 U.S. at 434 n.9.

since a plaintiff who brings a non-meritorious suit would not qualify as a "prevailing party" entitled to fees. *See, e.g., Gram v. Bank of Louisiana*, 691 F.2d 728, 730 (5th Cir. 1982); *Chicano Police Officer's Association v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980). Moreover, defendants have an array of weapons to combat frivolous litigation.[43] Petitioners' concern is not the frivolous, but the meritorious case, such as this one.

* * * *

In sum, petitioners and amici seek to divert the Court from the facts of this case and the only issue decided below—whether the fee waiver demanded by petitioners as a condition of a favorable settlement was properly invalidated as contrary to Section 1988 and the public policy it reflects. Petitioners' take-it-or-leave-it settlement proposal, offering substantial merits relief only if respondents waived all claims to fees, sought to create and exploit a conflict of interest between respondents and their counsel in order to avoid liability under Section 1988. The real harm from this tactic is not only to the lawyers or to the plaintiffs in a particular suit, but to future victims of civil rights violations who will go unrepresented. This is precisely the problem Congress sought to address in enacting Section 1988. Judicial enforcement of such fee waivers would undermine the purposes of Section 1988, leaving "our civil rights laws . . . mere hollow pronouncements which the average citizen cannot enforce." Senate Report, at 6.

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[43] Defendants can dispose of frivolous suits by filing a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. In addition, they may seek costs and attorney's fees under Section 1988 itself, and they may recover costs and fees from counsel under Rule 11 and 28 U.S.C. § 1927 (1982) if the litigation was frivolous or vexatious.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the decision of the court of appeals should be affirmed.

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